

**IN THE SUPREME COURT OF THE STATE OF IDAHO**  
**Docket No. 28660**

**L. DARWIN MCKAY and PATRICIA MC  
KAY, husband and wife, and THE TURF  
COMPANY, LLC,**

**Plaintiffs-Respondents,**

**v.**

**BOISE PROJECT BOARD OF  
CONTROL, a/k/a BOARD OF  
CONTROL,**

**Defendant Appellant.**

**Boise, November 2003 Term**

**2004 Opinion No. 95**

**Filed: July 22, 2004**

**Frederick C. Lyon, Clerk**

**SUBSTITUTE OPINION. THE  
COURT'S PRIOR OPINION DATED  
JULY 7, 2004, IS HEREBY  
WITHDRAWN.**

Appeal from the District Court of the Fourth Judicial District, State of Idaho, Ada County. Hon. Michael R. McLaughlin, District Judge.

District court's determination of negligence in the exercise of defendant's use of flowage easement and award of subsequent damages is vacated and reversed with remand.

Moore, Baskin & Parker, Boise, for appellant. Paige A. Parker argued.

Westberg, McCabe & Collins; Bevis, Cameron & Johnson, Boise, for respondents. William D. Collins and James A. Bevis argued.

Norman M. Semanko, Boise, for Amicus Curiae Idaho Water Users Association.

BURDICK, Justice

R. Darwin and Patricia McKay (McKay) and their company, the Turf Company, LLC, brought this action after incurring a crop loss resulting from the flooding of land in the Hubbard Reservoir basin. The Boise Project Board of Control (Project) holds the flowage easement in the Hubbard Reservoir, which pursuant to a 1979

judgment<sup>1</sup> allows the Project to flood the reservoir for “routine irrigation operations it may desire,” up to a certain water level. After a court trial on McKay’s claims, the district court found the Project had breached its duty to exercise the flowage easement in a reasonable manner and in accordance with the 1979 stipulated judgment. The district court awarded damages to McKay and issued a permanent injunction. The injunction effectively changed the scope of the flowage easement from permitting flooding for “routine irrigation operations it may desire” to provide that the Project “may not flood the servient estate, presently leased by [McKay] in filling Hubbard Reservoir except in the good faith pursuit of legitimate irrigation goals.” The Project appealed the decision of the district court, asserting its right to full use of the flowage easement as decreed in the 1979 judgment, notwithstanding the high seepage rate of the reservoir. This Court reverses the trial court’s permanent injunction, vacates the award of damages to McKay, and remands for further proceedings consistent with this opinion.

### **FACTUAL BACKGROUND**

Joan Sterling and her husband, Lance Fleming, (now deceased) purchased the subject land from the State of Idaho in 1967. Located in the Hubbard Reservoir basin, the land is encumbered by a flowage easement held by the Project. The land sale certificates indicate that the land “is subject to inundation by waters of Hubbard Reservoir.” While she owned the land, Sterling did not farm below the 2,771-foot elevation and did not complain of irregular flooding to the 2,771-foot elevation. In 1992, Sterling leased the land to R. Darwin McKay and Patricia McKay. The lease agreement contained a provision specifically authorizing a reduction in the rent in the event the land was flooded for more than thirty days. McKay planted turf grass as a cash crop on all of the property leased from Sterling.

In January of 1996, McKay approached the Project’s Board of Directors about the flooding of his leasehold during the previous year. There was a discussion about a means of reconciling the Project’s continued use of the Hubbard Reservoir while preserving McKay’s crop production. In reliance on the 1979 judgment interpreting the Project’s

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<sup>1</sup> In a 1976 action filed by the State of Idaho against the Boise Project Board of Control, the district court entered a stipulation and judgment dated November 1, 1979, which provided that the Board could fill the Hubbard Reservoir to 2,771 feet for routine irrigation operations based on the elevation gauge on Hubbard Dam.

flowage easement as a right to flood for “routine irrigation operations,” the Board of Directors sent a letter to Sterling as the landowner informing her of the Project’s intent to fill the Hubbard Reservoir to the level of 2,766 feet in 1997 and to hold the water there, if conditions allowed.

1997 was an above average water year. The Board decided to take excess river flow from the Boise River and to fill the reservoir, recording the inflow and the depth of water starting in April, 1997. On about March 18, 1997, the backwater from Hubbard Reservoir began to reach McKay’s turf fields. On May 22, 1997, the Board stopped the inflow into the reservoir and measured the maximum level of the water at 2, 767.8 feet. The water left McKay’s turf fields on approximately May 29, 1997.

As a result of the flooding, McKay brought an action alleging intentional tort, negligence, inverse condemnation and trespass. McKay primarily claimed damages from the Project’s negligent use of the flowage easement and intentional trespass of his leasehold. Prior to trial, McKay notified the district court that it would not present any evidence of damage for the inverse condemnation count.

On May 31, 2002, the district court entered its findings of facts, conclusions of law and judgment and issued its amended findings, conclusions and judgment on July 31, 2002. The district court sitting without a jury ruled that the Project’s conduct in 1997 of raising the level of the reservoir so as to flood McKay’s fields was negligent. The district court rejected the Project’s argument that it was entitled to immunity for its conduct, under I.C. § 6-904(1), and awarded damages to McKay for his losses suffered as a result of the flooding. The Project timely appealed the decision of the district court.

### **ISSUES ON APPEAL**

1. Did the district court err in finding the Project negligent in the use of the Hubbard Reservoir flowage easement?
2. Is the Project entitled to immunity as provided by Idaho Code § 6-904(1)?
3. Did the district court err in basing its damage award upon a market share analysis?
4. Did the District Court err in finding McKay in privity with the State of Idaho and thus bound by the 1979 judgment?

## STANDARD OF REVIEW

A district court's findings of fact in a court-tried case will be liberally construed on appeal in favor of the judgment entered, in view of the district court's role as trier of fact. *Western Heritage Ins. Co. v. Green*, 137 Idaho 832, 835, 54 P.3d 948, 951 (2002) (citing *Conley v. Whittlesey*, 133 Idaho 265, 269, 985 P.2d 1127 (1999); *Lindgren v. Martin*, 130 Idaho 854, 857, 949 P.2d 1061, 1064 (1997)). Review of the decision is limited to ascertaining whether the evidence supports the findings of fact and whether the findings of fact support the conclusions of law. *Id.* If the findings of fact are based on substantial evidence, even if the evidence is conflicting, they will not be overturned on appeal. *Id.* However, this Court exercises free review over questions of law. *Id.*

## ANALYSIS

We begin by addressing McKay's challenge to the district court's finding of privity, which was the cornerstone of its analysis leading to its conclusion that McKay was bound by the 1979 Judgment. There is no question but that the Project is bound by the 1979 judgment. Concerning McKay, the trial court found:

[The] McKays argue that they were not bound by Judge Smith's earlier decisions because they were not privy to the action. The Court will find that the McKays' predecessors in interest were clearly privy to the litigation that occurred in the 1970s. This was property that at the time was owned by the State of Idaho. The State was directly involved in the litigation and Ms. Fleming [now Sterling], who was purchasing land from the State at the time, was privy of the State of Idaho and is bound by the 1979 stipulation.

McKay, the respondent herein, asserted lack of privity as an additional issue on appeal, seeking reversal of the district court's conclusion that McKay was bound by the 1979 Judgment. Were the Court to find error on this legal issue, it must vacate the district court's opinion and remand for findings as to the reasonable use of the easement in light of the express grant of the easement described in Sterling's original Land Sale Certificate. However, we conclude that the issue is not properly before the Court.

Idaho Appellate Rule 15 states:

Right to cross-appeal. After an appeal has been filed, a timely cross-appeal may be filed from any interlocutory or final judgment, order or decree. If no affirmative relief is sought by way of reversal, vacation or modification of the judgment, order or decree, an issue may be presented

by the respondent as an additional issue on appeal under Rule 35(b)(4) without filing a cross- appeal.

Thus, I.A.R. 15 requires a respondent to file a cross-appeal if affirmative relief by way of reversal, vacation or modification is sought. *Miller v. Board of Trustees*, 132 Idaho 244, 247-48, 970 P.2d 512, 515-16 (1998). “A timely notice of cross appeal is a jurisdictional prerequisite to challenge a determination of a lower court. Failure to timely file such a notice of cross appeal ‘shall cause automatic dismissal’ of the issue on appeal.” *Id.*, citing *Carr v. Carr*, 116 Idaho 754, 757, 779 P.2d 429, 432 (Ct. App. 1989).

This issue should have been presented by McKay as a cross-appeal and was not. Pursuant to I.A.R. 15, the issue is not properly before the court and will not be considered.

## I.

The district court sitting without a jury, held the Project liable for negligence in the exercise of its flowage easement based upon two theories. First, the district court found the 1979 district court decree defining the Project’s easement for “routine irrigation purposes” to be ambiguous. Second, the district court held the use of Hubbard Reservoir to be an unreasonable irrigation practice because it wasted water.

### A. History of Hubbard Reservoir

Hubbard Reservoir was constructed in 1902 by Daniel R. Hubbard in connection with and for the Idaho-Iowa Lateral and Reservoir Company (Idaho-Iowa). The reservoir is supplied by the New York Canal, which was opened for the first time in February of 1909. The Reclamation Service (Bureau of Reclamation) filled the Hubbard Reservoir and it went practically dry in fifteen days. During its early years, the reservoir was used as a waste-way and under certain circumstances as an irrigation storage facility. Prior to turning the reservoir over to the Bureau of Reclamation, Idaho-Iowa started a condemnation proceeding for reservoir purposes in order to store water for irrigation. In 1911, the district court entered an order condemning that property for the construction and maintenance of a reservoir and for such purpose “to completely use, enjoy, and control the same.” In 1912, the Idaho-Iowa granted to the United States all its interest in the Hubbard Reservoir.

A second judicial determination of the Hubbard Reservoir easement was begun in 1976 as a result of the State of Idaho's complaint against the Project for alleged damages and trespass because of grazing on the easement. Finally, in 1979, the parties to that litigation settled the dispute and entered into a stipulation, which was reduced to a judgment on November 1, 1979. That judgment reads in part as follows:

11. The Boise Project Board of Control, be, and it is hereby, restrained from filling that portion of Hubbard Reservoir lying above the level of 2771.00, as measured on the staff gauge on the dam of the Hubbard Reservoir except in the event of an irrigation emergency. For the purpose of this order, an irrigation emergency shall exist when, in the sole discretion of the Manager of the Boise Project Board of Control, the integrity of any of the irrigation works operated by the Boise Project Board of Control is threatened with damage in [t]he absence of removal of water from said works by diversion into the Hubbard Reservoir, provided, that the Boise Project Board of Control shall reduce the level of water in said Hubbard Reservoir following any such emergency which reduces the level of the water in the reservoir to the level of 2771.00 on the staff gauge at the maximum rate possible, consistent with good water management practices.

\* \* \*

13. That the Boise Project Board of Control may, at any time and without violation of this Order and without any requirement as to notice, except as hereinabove set forth utilize the reservoir below the level of 2,771.00, as measured on the staff gauge, for any routine irrigation operations it may desire;
14. That all prior injunctive orders issued in the above-entitled matter be, and the same hereby are vacated. (Emphasis added.)

As part of the judgment, the district court also decreed the State of Idaho the fee simple owner of the land under the Hubbard Reservoir and the Bureau of Reclamation the owner of a permanent flowage easement (subject to this decree) to use Hubbard Reservoir being operated by the Project.

### **B. Ambiguity of 1979 Judgment**

To resolve the ambiguity, the district court analyzed the historical use of the reservoir. The district court was then compelled to find that the use in 1997 was not consistent with the historical use as decreed in 1979: “. . .alleviating flooding . . . repair on the canal system downstream. . . . Additionally . . . stored water for short periods of time – usually three-four days . . . .” Because the Project's use did not meet the historical

use of flood control, casual repair or short-term use, the district court concluded that the use in 1997, therefore, was unreasonable.

Determination of whether a writing is ambiguous is a question of law for the court. *City of Chubbuck v. City of Pocatello*, 127 Idaho 198, 899 P.2d 411 (1995). Ambiguity results when reasonable minds might differ or be uncertain as to its meaning, however ambiguity is not established merely because different possible interpretations are presented to a court. *State v. Browning*, 123 Idaho 748, 852 P.2d 500 (Ct. App. 1993). This Court finds that the language of the 1979 judgment was not ambiguous.

In finding the language of the 1979 judgment ambiguous, the district court commented:

The court cannot glean from the face of the stipulation or supporting documents what the parties specifically meant by “routine irrigation operations.” Judge Smith in his earlier decision had clearly focused upon the duty of the dominant estate in relationship to the servient estate and had also focused on historical use of the flowage easement.

The reference to Judge Smith’s earlier decision came from a portion of a memorandum decision dated July 11, 1978, wherein the judge stated:

This Court must then conclude that the flowage easement involved in this case may only be exercised for the purposes of irrigation. The defendants may not flood the land of the plaintiffs except in the good faith pursuant of permissible irrigation goals. When exercising their right to flood the plaintiff’s lands the defendants operate under a duty imposed by law to avoid unnecessary damage to the servient estate or unnecessary interference with the legitimate use of the servient estate by the plaintiff and their privies. Any intentional or malicious use of the easement for the purpose of flooding plaintiff’s well and pump or otherwise interfering with the plaintiff’s use of the land shall be unlawful.

The evidence in this case indicates that irrigation purposes have rarely required full exercise of the easement in the past but it cannot be said that future conditions will not produce a bona fide reasons for full use of the reservoir.

Accordingly, the injunction should be modified. The defendants should be enjoined from any intentional, malicious flooding of the reservoir for the purpose of destroying plaintiff’s property or interfering with the plaintiff’s use of the property. Defendant’s use of the easement should be limited to the good faith exercise of their flowage rights in pursuant of legitimate irrigation purposes. When so modified the injunction shall operate as an added protective measure supplementing any cause of action which the plaintiff may have for misuse of the easement, trespass, or tort resulting

from any unlawful interference. The existence of damage actions in such cases do not preclude injunctive protection and the remedies available for any malicious or otherwise wrongful acts of flooding are cumulative. . . .

It is thus plain that Judge Smith meant the Project Board could use the reservoir for purposes of irrigation and that the Project was enjoined from any intentional, malicious flooding of the reservoir for the purposes of destroying the plaintiff's property.

Irrespective of Judge Smith's memorandum decision, the parties subsequently entered into a stipulation that was reduced to a judgment by Judge Smith and entered on November 1, 1979. The Judgment gave the Project the right to fill the reservoir to the 2,771-foot elevation level at any time and without any requirement as to notice for any routine irrigation operations it may desire.

Judge Smith had examined the historical use of the Hubbard Reservoir because the case before him dealt with the ownership rights of the Bureau of Reclamation and the State of Idaho, as well as other lessees of the Project and their rights to use the land subject to inundation by Hubbard Reservoir. During that litigation, there were many allegations and some findings that the Project had intentionally misused its easement by allowing for-fee grazing. Judge Smith ruled the Bureau of Reclamation owned the flowage easement that the Project was using, but he held that the underlying land belonged to the State of Idaho.

The district court in this case found the 1979 judgment language, "routine irrigation operations," ambiguous and further applied a historical use analysis much as Judge Smith did in the 1970's, which was not necessary in this case. The district court here had to resolve whether the use of the easement by the dominant estate, as defined by Judge Smith and in light of actual notice to the servient estate of the dominant estate's use of the easement, was consistent with the plain meaning of "routine irrigation operations." There was no evidence of intentional or malicious flooding of the reservoir in this case.

As this Court has previously held:

Construction of the meaning of a contract begins with the language of the contract. "If the contract's terms are 'clear and unambiguous,' the determination of the contract's meaning and legal effect are questions of law. . . . and the meaning of the contract and intent of the parties must be determined from the plain meaning of the contract's own words." If,



however, the contract is determined to be ambiguous, “the interpretation of the document is a question of fact which focuses upon the intent of the parties.”

*Albee v. Judy*, 136 Idaho 226, 230, 31 P.3d 248, 252 (2001) (citations omitted). In determining whether a contract is ambiguous, this Court ascertains whether the contract is “reasonably subject to conflicting interpretation.” *Bondy v. Levy*, 121 Idaho 993, 996, 829 P.2d 1342, 1345 (1992). “The determination and legal effect of a contractual provision is a question of law where the contract is clear and unambiguous, and courts cannot revise the contract in order to change or make a better agreement for the parties.” *Id.* at 997, 829 P.2d at 1346. Questions of law are reviewed by the Court *de novo*. *Id.*

In *Sherwood v. Carter*, 119 Idaho 246, 254, 805 P.2d 452, 460 (1991), this Court stated:

The word “ordinary,” as defined in *Webster’s Seventh Collegiate Dictionary* means “routine, normal.” *Black’s Law Dictionary* (6<sup>th</sup> ed.) defines “ordinary” as “usual, common, customary, reasonable, not characterized by peculiar or unusual circumstances.”

The language, “routine irrigation operations,” does not appear to be subject to conflicting interpretations. It seems to allow the Project to conduct ordinary or normal irrigation operations. The word “routine” does not mean that only the historical use or historical operation of the Hubbard Reservoir may be performed by the Project. Rather, any “usual, common, customary [or] reasonable” irrigation operation may be performed by the Project. *See id.* The phrase “routine irrigation operations” has a different connotation than routine irrigation purpose. The word “operation” has a broader connotation, including all of the management decisions, repair functions, and other support activities, which result in the actual irrigation of fields.

The 1979 judgment clearly allows the Project at any time without notice to utilize the reservoir for any “routine irrigation operations.” The filling of a storage reservoir for purposes of this judgment is a routine irrigation operation. Additionally, because the district court found there was water in 1997 that was used for downstream irrigation, there is evidence of actual irrigation purpose. The term, “it may desire,” plainly means the Board may decide the irrigation operations it felt necessitated the filling of the reservoir.

It is well established in this jurisdiction that an easement is the right to use the land of another for a specific purpose. *Abbott v. Nampa School Dist. No. 131*, 119 Idaho 544, 548, 808 P.2d 1289, 1293 (1991). The easement owner is entitled to full enjoyment of the easement. *Carson v. Elliott*, 111 Idaho 889, 890, 728 P.2D 778, 779 (Ct. App. 1986). To the degree privileges are expressly granted, the easement owner's rights are paramount to those of the servient owner. *Boydston Beach Assoc. v. Allen*, 111 Idaho 370, 376-77, 723 P.2d 914, 920-21 (Ct. App. 1986). Every easement is a particular easement, privileging the owner thereof to make particular uses of a servient estate. The more precise the express language of the easement, the more certainty there is regarding the specific privileges granted. *Id.*

The flowage easement for the Hubbard Reservoir is an express easement; it was established in the 1979 judgment of Judge Smith. The judgment allows that Hubbard Reservoir may be filled to the elevation of 2,771 feet at any time for any "routine irrigation operations" the Project may desire. The filling of a reservoir based upon the normal, routine operating procedures of an irrigation district is for an irrigation purpose. The district court in fact found that a portion of the water in the Hubbard Reservoir was used for irrigation in 1997, while recognizing that there may be other benefits to the use of the reservoir, *i.e.*, recreation, seepage, and storage of water for purposes other than irrigation.

In this case, the servient estate had actual knowledge of inundation to the 2,771-foot elevation and of the intent of the Project to use the reservoir to the 2,766-foot elevation in 1997. With that notice, McKay continued to plant turf grass. Planting grass with this notice below the 2771 foot level was at McKay's own risk. This is especially so when the easement precisely defines the level to which the reservoir may be used for irrigation operations and the servient estate owner has actual knowledge of the prospective use for the water year.

In *Boydston Beach Assoc. v. Allen*, *supra*, the Court of Appeals quoted 5 RESTATEMENT OF PROPERTY, SERVITUDES § 486 (1994):

The possessor of land subject to an easement created by conveyance is privileged to make such uses of the servient tenement as are not inconsistent with the provisions of the creating conveyance.

*Comment:*

*a. Uses not inconsistent with conveyance.*

So far as the language of the conveyance creating an easement precisely defines the privileges of the owner of it, the privileges of use of the owner of the servient tenement are also precisely defined. As the precision of definition decreases, the application of the principle that the owner of the easement and the possessor of the servient tenement must be reasonable in the exercise of their respected privileges becomes more pronounced. Under this principle, the privilege of use of the possessor of the servient tenement may vary as the respective needs of himself and the owner of the easement vary.

**C. Unreasonable use of the easement**

The district court held that the Project had breached its duty to the servient tenant by acting outside the scope of the 1979 judgment and without a reasonable or prudent irrigation purpose. Specifically, the district court found that only about six percent of the water had been used by downstream irrigation users and that approximately eighty percent of the reservoir's capacity was lost through percolation. The district court further found that Lake Lowell was available to the Project for storing excess river flow as an alternative to filling Hubbard Reservoir. Of particular significance, the district court determined that filling Hubbard Reservoir violated Idaho's policy against wasting water, expressed in I.C. § 18-4302 and other code sections.

In order to prove negligence, the plaintiff was required to prove the following:

A duty recognized by law, requiring the defendant to conform to a certain standard of conduct; breach of that duty; a causal connection between the defendant's conduct and the resulting injuries; and actual loss or damage.

*Bramwell v. South Rigby Canal Company*, 136 Idaho 648, 39 P.3d 588 (2001);

*Brizendine v. Nampa-Meridian Irrigation District*, 97 Idaho 580, 548 P.2d 80 (1976).

The standard to which the Project must conform its conduct in this case is enunciated in the 1979 judgment that provides for the filling of the reservoir by the Project to a level of 2,771 feet, for any routine irrigation operations it may desire. The district court's findings, however, indicate that the district court substituted its judgment regarding the reasonableness of the Project's use of the flowage easement for the discretion conferred to the Project by the express terms of the easement. As we previously held, *infra*, the filling of the Hubbard Reservoir was a routine irrigation operation; and the Project cannot be found to be negligent therefor.

McKay raised the issue of waste, asserting that use of the easement that resulted in waste was *per se* a breach of the Project's duty. The district court agreed, identifying various statutes, which proscribe waste as a matter of policy in Idaho, as the source of that duty. Idaho Code § 18-4302 provides: "any person or persons who shall willfully and wantonly waste any of the waters of any stream, the waters of which are used for irrigation, to the detriment of any claimant of the water for irrigation purposes. . . are guilty of a misdemeanor." A person who uses an excess of water within the limits of good husbandry then is liable to the owner of or person entitled to the water for the use of such excess. This code section only allows recovery for waste by a claimant entitled to use the water. The other code sections cited by the district court, which also promote the State of Idaho's policy against the wasting of water, authorize the State or other users of the water to raise the issue of waste; but not the servient estate to a flowage easement, unless the waste produces some direct damage, such as seepage, canal break, etc. McKay is not a claimant entitled to use any water from the filling of Hubbard Reservoir and therefore has no standing to assert waste as a violation of an alleged duty owed to him by the Project.

By this holding, we do not condone the waste of water. *See Kunz v. Utah Power & Light*, 117 Idaho 901, 904, 792 P.2d 926, 929 (1990) ("The policy of the law of this State is to secure the maximum use and benefit, and least wasteful use, of its water resources (citations omitted)"). The policy of the State is not to waste water, however waste water is the jurisdiction of the Idaho Department of Water Resources or other users of water on the source who are adversely affected. The existence of an easement for a conveyance or storage is unaffected by the inefficiency of the conveyance or the storage facility unless other users of the water object or the servient tenant is injured as a direct result of the waste of the water. Although the use of an easement whose waste causes damage could be actionable, *see Kunz, supra*,<sup>2</sup> there was no allegation that the wasteful nature of the easement use caused any damage to the servient estate in this case. The

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<sup>2</sup> *Kunz* answers the question: "[W]hy does Idaho law limit the theories of liability which can be brought against an irrigation system operator whose canal floods over its banks. . . ?"

servient estate in this case was not affected by the storage loss in any way. Thus, the issue of waste was irrelevant.

As operator of the diversion and storage system, the Project is “not an insurer against all damages arising from [its storage system] but is liable when negligent in the construction, maintenance and operation thereof.” *Id.* at 906, 792 P.2d at 931 (citation omitted). The Project filled the Hubbard Reservoir for routine irrigation purposes and other beneficial uses and did not exceed the prescribed limitations of the easement. When the irrigation reservoir was filled to that level, McKay nevertheless planted a cash crop below the 2,771-foot prescribed limit and requested damages for the resultant loss of his crop. In that the Project used its defined flowage easement in the Hubbard Reservoir for the purpose for which it was created, we conclude that there was no breach of a duty owed to the servient estate under these circumstances and thus no negligence on the part of the Project.

We find the language of the easement unambiguous and hold that the Project acted within the confines of the easement. Accordingly, we reverse the district court’s finding that the Project was negligent in its use of the easement.

## II.

The district court characterized the decision to fill Hubbard Reservoir as a routine operating decision and not such as to require immunity under the policies underlying a grant of immunity. The district court concluded that the Project is not immune under I.C. § 6-904.

Idaho Code section 6-904(1) provides:

A government entity and its employees while acting within the course and scope of their employment and without malice and criminal intent shall not be liable for any claim which:

1. Arises out of any act or omission of an employee of a governmental entity exercising ordinary care, in reliance upon or the execution of poor performance of a statutory or regulatory function, whether or not the statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or to perform a discretionary function or duty on the part of a governmental entity or employee thereof, whether or not the discretion be abused.

“The test for determining the applicability of discretionary function immunity looks at the nature of the conduct.” *Brooks v. Logan*, 127 Idaho 484, 488, 903 P.2d 73, 77 (1995). “Routine matters not requiring evaluation of broad policy factors will likely be ‘operational,’ whereas decisions involving a consideration of the financial, political, economic and social effects of a particular plan are likely ‘discretionary’ and will be accorded immunity.” *Id. citing Lawton v. City of Pocatello*, 126 Idaho 454, 460, 886 P.2d 330, 336 (1994). Discretionary or planning functions are exempt from liability and tort, whereas operational functions conducted without ordinary care will not be entitled to governmental immunity. *Crown v. State of Idaho, Department of Agriculture*, 127 Idaho 175, 179, 898 P.2d 1086, 1091 (1995). We then examine the challenged conduct in light of the policies advanced by the exception: “to permit those who govern to do so without being unduly inhibited by the threat of liability and to limit judicial second-guessing of basic policy decisions entrusted to other branches of government.” *Brooks v. Logan*, 127 at 488, 903 P.2d at 77.

The Project contends that the decision made by its Board has all the hallmarks of a planning decision not just an operational one, including that it was made with the advice of counsel, by the highest authorities of the Project, and pursuant to controlling legal authority. It occurred in the context of a temporary supply of floodwater, and it allocated the commodity between competing sources.

The decision by the Project to fill the Hubbard Reservoir appears to be a routine decision of the Board. Granted, there was involvement of the Project’s directors in the decision because of the appearance of McKay at the Board meeting. There was no other place McKay could go to plead his case. The Board meetings he attended were open to all and included mundane issues of paying bills, etc. These are not the policy issues I.C. § 6-904 anticipated.

There was some legal analysis of the longstanding limitation (1979 judgment) on the Project’s decision; but it was still a decision to use an existing facility for usual use, if yearly water flows allowed. Nothing seems more routine than filling an existing reservoir with water. The Project’s role is to make decisions with regard to the irrigation and floodwater, and it decided that the Hubbard Reservoir should be filled. The Project filled the reservoir in 1997, pursuant to the 1979 judgment. The Project did not exceed

the limits prescribed by the 1979 judgment and determined that the water would be put to beneficial use by placing it in the Hubbard Reservoir for irrigation, floodwater control and other purposes. Therefore, we affirm the district court's decision holding that the Project was not immune from liability under I.C. § 6-904. *Crown*, 127 Idaho 179, 898 P.2d 1091.

### **CONCLUSION**

As a result of this conclusion and having held that the Project was not negligent in the use of the flowage easement, we need not discuss the third issue raised on appeal. We reverse the judgment of the district court, vacate the damage award in favor of McKay and remand to the district court for further proceedings consistent with this opinion. Costs to the appellant.

Chief Justice TROUT and Justices SCHROEDER, KIDWELL and EISMANN,  
**CONCUR.**